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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 20

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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Respondent Authority concedes, at page 11 of its brief:

"We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected."¹

Thus, the Authority agrees that if termination is for the purpose of limiting the tenant's constitutional rights, it is invalid notwithstanding the provisions of the lease and notice of termination in accordance with the lease. This concession embodies admissions that (1) the Authority, unlike a private landlord, is subject to constitutional restrictions in dealing with its tenants, and (2) the tenant's rights

¹ Respondent also agrees at page 12 of its brief that there are reasons for which it could not terminate petitioner's lease.

are not merely contractual and dependent on the lease. The Authority's position lends additional weight to petitioner's contention that prior notice of the reason for eviction is essential in order to determine whether the Authority is acting constitutionally, for if the Authority is not required to give a reason for eviction before bringing summary proceedings, it can easily disguise eviction for a proscribed reason by relying solely on the 15-day notice provision of the lease.

Nevertheless, the Authority clings tenaciously³ to its position that it can evict arbitrarily. It would say, in effect, to its tenants: We can evict you from our public housing project for any reason, however silly, or for no reason at all. The Authority will not tell a tenant why he is being thrown out and will not allow the tenant to find out until after it orders him to leave and only if it sues for possession. Even then the Authority will not disclose its motive. If the tenant somehow suspects that it is evicting him because it wants to deprive him of some constitutional right, it is up to the tenant to get a lawyer and prove at trial that he is being evicted for an unconstitutional reason.

No agency of government subject to constitutional restrictions should be permitted so to trifle with the rights of beneficiaries of government programs. To permit a housing authority to deal in secrecy, with no procedural safeguards for its tenants, is to increase the likelihood of favoritism, partiality, and arbitrariness on the part of the authority; "the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse." *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

³ See respondent's brief, 12-18.

In the *Holmes* case, the Second Circuit decided that applicants for apartments in the New York City Housing Authority's projects were entitled, as a matter of due process of law, to have the Authority promulgate standards for admission to public housing and establish fair and orderly procedures, including informing applicants of the reasons for a determination of ineligibility. The *Holmes* decision is persuasive in the instant case, for it would be anomalous if mere applicants for public housing were entitled to some semblance of due process but existing tenants could summarily be thrown out without being told a reason.

In support of its contention that it can evict arbitrarily, respondent cites *Randell v. Newark Housing Authority*, 384 F.2d 151 (3rd Cir. 1967).³ The *Randell* case does not support the Authority's position. In marked contrast to the procedures followed in the instant case, where the Authority specifically refused to give Mrs. Thorpe any reason for her eviction and specifically refused to give her an opportunity or a hearing to inquire into its reason, if any, the housing authority in the *Randell* case systematically followed these procedures: (1) efforts were made to rehabilitate tenants where serious complaints were made against them, and in most cases no eviction was required; (2) each case of a complaint was investigated by a case worker; (3) the tenant was informed of the complaint against him; (4) the tenant was given an opportunity to state his views as to the complaint to the case worker; (5) written reports were filed by the case worker; and (6) the tenant was informed of the decision to evict him and was "given all the reasons therefor" before legal proceedings were instituted. 384 F.2d at 154. Moreover, the Court said that the Newark Housing Authority substantially complied with the HUD

³ Respondent's brief, 8-9, 10.

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circular also involved in the instant case and admittedly not complied with by respondent.⁴

Far from holding that public housing tenants have no right to due process safeguards, the Court in the *Randell* case said that the New Jersey public housing procedures, which accorded a tenant—in addition to the administrative safeguards just described—the right to raise equitable defenses in summary eviction proceedings and to sue the landlord in a civil action where the proceedings were unlawful⁵ probably would guarantee due process to the tenants. But the Court stopped short of saying that a hearing in the state summary eviction proceedings would indeed satisfy due process requirements for public housing tenants, even when preceded by fuller and fairer administrative procedures than those followed (or not followed) by respondent in the instant case. In remanding the case to the District Court to vacate its order dismissing the action, the Third Circuit reasoned that while the New Jersey judicial proceedings might provide the tenants with due process protections, the federal courts should stand by in case the tenants could show that the state proceedings were inadequate to protect their constitutional rights.⁶

⁴ The Court stated that the HUD circular "presumably applies" to the Newark Housing Authority, 384 F.2d at 154; an obligation which respondent in the instant case seeks to avoid. See Respondent's brief, 21-30.

⁵ Compare the North Carolina statutes set forth in the Appendix to petitioner's main brief, 21a-25a. For a much more enlightened legislative approach to the problems involved here, see Mass. Gen. Laws, Sec. 43, Chap. 121 (enacted July 15, 1968), which prohibits termination of public housing tenancies unless for cause and after a hearing.

⁶ Petitioner, of course, urges that this Court go further than the holding in *Randell*. We urge that a hearing in judicial summary eviction proceedings cannot meet due process requirements, in the context of North Carolina's procedure for evicting public housing tenants, because notice of the reason for eviction and an oppor-

Respondent distorts petitioner's position when it asserts, at page 11 of its brief, that in an eviction proceeding the Authority must show, in addition to introducing the lease and its termination by notice, a "judicially acceptable reason" for termination. This misses the point: We say that the Authority has a constitutional obligation to give a tenant *prior* notice of the reason for eviction, affording the tenant an opportunity to contest the validity of this reason, if he so desires, either administratively or in court. In suggesting that, when it finally recognized that the reason for eviction was relevant, the North Carolina Supreme Court should have, instead of affirming, remanded this case to the trial court, we asked merely that the Authority be required to come forward with a reason—then petitioner could decide whether or not to contest it.

Petitioner does not concede that disclosure of the reason for eviction in a court hearing would ever satisfy due process requirements. We contend that the reason and a fair opportunity to contest the reason must be given before the

tunity to contest the reason are required *before the decision to evict is made*. See petitioner's brief, 48-49. We do not understand *Randell* to reject this position. As we read the Third Circuit, it merely declines to decide whether the New Jersey judicial hearing can satisfy due process requirements until it has seen the nature of the hearing provided. This may be an appropriate disposition in *Randell* since the New Jersey judicial proceedings follow an administrative procedure in which the tenant is given notice and an opportunity to be heard before the decision to evict is made. A similar disposition here would be inappropriate.

Of course the reason must be "judicially acceptable" in the limited sense that it cannot violate the Constitution or the Housing Act and it must withstand judicial scrutiny in light of the statutory purposes of the federal public housing program. See Mr. Justice Douglas' concurring opinion, *Thorpe v. Housing Authority*, 386 U.S. 670, 679-80 (1967); see also 42 U.S.C. §1410(g)(2), set forth in petitioner's brief at 3a.

decision to evict is made.^{*} Only in this way can public housing officials be required to act fairly, with due consideration, and upon adequate information, as the Constitution demands. The requirement that a reason be stated is the slightest available safeguard to assure that a reason exists. And the requirement that the housing authorities, not a court, hear the tenant's reply to the reason stated, is simply a recognition that it is the housing authorities, not the court, who make the decision to evict. As a practical matter, the decision by the housing authorities will often be the only decision that an impoverished public housing tenant can affect, for he usually will not have resources or knowledge of his rights sufficient to take the Authority to court. Even if he does, he cannot make a reasoned decision regarding the probability of a successful court fight without the reason for eviction. In any event, the issue before the summary eviction court—even on the relatively broad notion of its power to review the Authority which respondent now asserts for the first time in this Court, without the slightest support in North Carolina law or in the record of proceedings in this case—is still very narrow. The court does not sit as a housing development supervisor, to redetermine whether or not a tenant ought to be evicted. And it is that decision to evict, the critical one for the tenant, which must be made conformably to due process guarantees. The very breadth of discretion allowed to the Authority in making it is a compelling reason to demand administrative procedures that will assure it is fairly made in the first instance.

But, should it be determined that effective judicial scrutiny of the administrative decision to evict can ever be had in summary eviction proceedings, in such a fashion as to satisfy the due process clause, certainly, the proceedings

^{*} See petitioner's brief, 48-49.

actually had below in petitioner's case were inadequate to meet due process guarantees. Respondent's blithe assertion, at page 10 of its brief, that at the "trial" of a North Carolina summary eviction proceeding it would be possible to question not only the timeliness of a notice of termination but also "its motivation", is not in accord with either the North Carolina statutory scheme for summary eviction or the pronouncements of the trial court and the North Carolina Supreme Court, when it first considered this case, that the reason for termination was "immaterial". Respondent points to no decision permitting any inquiry into the reason for termination. As set forth in petitioner's main brief, the North Carolina statutes and decisions do not contemplate that eviction proceedings may be anything more than what they are labeled—"summary". Section 42-31 of the statute, set forth at page 23a of petitioner's brief, provides that "If the defendant [tenant] by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be." Since all the landlord needs allege is that the tenant held over after the term had expired and that the landlord had demanded surrender of the premises (Section 42-26(1), petitioner's brief, 21a), as the Authority did in this case, the tenant could not deny any "material allegation". The statute thus does not contemplate any inquiry into the reasons for the landlord's action. Moreover, to assert that this petitioner has had an opportunity to have a fair hearing in court (although not administratively) on the reasons for her eviction, begs the question whether she is entitled to prior notice of the reason and thus an opportunity adequately to prepare for any hearing.

Running persistently through respondent's brief is the theme that petitioner contends that the Constitution requires Congress "to provide housing for all indigent per-

sons",⁹ that "all equally eligible indigents have a constitutional right to occupancy",¹⁰ and that "all members of the eligible class shall have low-rent housing within a housing authority project."¹¹ This, of course, is a red herring. Petitioner does not here claim that the federal or state government is obligated to furnish housing to poor people. Petitioner merely contends that once a poor person has been found eligible for the limited supply of public housing and is actually occupying an apartment, the Constitution comes into play to ban arbitrary or discriminatory cancellation of public housing benefits. As developed in petitioner's main brief, it does not matter whether the tenant's interest is characterized as a "right" or a "privilege"—due process safeguards apply in either case. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968).

⁹ Respondent's brief, 5.

¹⁰ *Ibid.*

¹¹ Respondent's brief, 24.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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